

EXHIBIT 104

Clifford, Margaret

October 29, 2008

Concord, NH

Page 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

-----X
In Re: PHARMACEUTICAL INDUSTRY) MDL No. 1456
AVERAGE WHOLESALE PRICE LITIGATION) Master File No.
-----) 01-CV-12257-PBS
THIS DOCUMENT RELATES TO:)
United States of America ex rel.) Hon. Patti B.
Ven-A-Care of the Florida Keys,) Saris
Inc., et al. v. Dey, Inc., et al.,)
Civil Action No. 05-11084-PBS,) VIDEOTAPED
and United States of America ex) DEPOSITION
rel. Ven-A-Care of the Florida) OF MARGARET
Keys, Inc., et al. v. Boehringer) CLIFFORD
Ingelheim Corp., et al., Civil)
Action No. 07-10248-PBS and United) OCTOBER 29, 2008
States, ex rel. Ven-A-Care of the)
Florida Keys v. Abbott)
Laboratories, Inc. Civil Action)
Nos. 06-CV-11337 and 07-CV-11618)
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Clifford, Margaret

October 29, 2008

Concord, NH

Page 2	Page 4
<p>1 Videotaped Deposition of MARGARET CLIFFORD</p> <p>2 Concord, New Hampshire</p> <p>3 Wednesday, October 29, 2008</p> <p>4 9:30 a.m.</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9 A P P E A R A N C E S</p> <p>10</p> <p>11 On behalf of the United States of America:</p> <p>12</p> <p>13 GEORGE B. HENDERSON, ESQ.</p> <p>14 Assistant United States Attorney</p> <p>15 United States Courthouse</p> <p>16 1 Courthouse Way</p> <p>17 Suite 9200</p> <p>18 Boston, MA 02210</p> <p>19 617-748-3272</p> <p>20 george.henderson2@usdoj.gov</p> <p>21</p> <p>22 (CONTINUED)</p>	<p>1 A P P E A R A N C E S (CONTINUED)</p> <p>2</p> <p>3 On behalf of Abbott Laboratories, Inc.:</p> <p>4</p> <p>5 ERIC P. BERLIN, ESQ. (Via telephone.)</p> <p>6 Jones Day</p> <p>7 77 West Wacker</p> <p>8 Chicago, IL 60601-1672</p> <p>9 312-269-4117</p> <p>10 epberlin@jonesday.com</p> <p>11</p> <p>12 ALSO PRESENT: Patrick Battle, Videographer</p> <p>13 Dwight Schwader (DOJ Associate)</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
Page 3	Page 5
<p>1 A P P E A R A N C E S (CONTINUED)</p> <p>2</p> <p>3 On behalf of the Witness:</p> <p>4 DEBORAH WEISSBARD, ESQ.</p> <p>5 Assistant Attorney General</p> <p>6 Department of Justice</p> <p>7 Office of the Attorney General</p> <p>8 33 Capitol Street</p> <p>9 Concord, NH 03301</p> <p>10 603-271-1196</p> <p>11 deborah.weissbard@doj.nh.gov</p> <p>12</p> <p>13</p> <p>14 On behalf of Dey, Inc.:</p> <p>15</p> <p>16 CLIFFORD KATZ, ESQ.</p> <p>17 Kelley Drye & Warren LLP</p> <p>18 101 Park Avenue</p> <p>19 New York, NY 10178</p> <p>20 212-808-7609</p> <p>21 ckatz@kelleydrye.com</p> <p>22</p>	<p>1 I N D E X</p> <p>2</p> <p>3 WITNESS: MARGARET CLIFFORD PAGE</p> <p>4 Examination By Mr. Katz..... 009</p> <p>5 Examination By Mr. Berlin..... 166</p> <p>6 Examination By Mr. Henderson..... 196</p> <p>7 Examination By Mr. Katz..... 248</p> <p>8 Examination By Mr. Berlin..... 285</p> <p>9 Examination By Mr. Henderson..... 318</p> <p>10</p> <p>11</p> <p>12 D E Y E X H I B I T S</p> <p>13 NUMBER DESCRIPTION PAGE</p> <p>14 Exhibit Dey 200-HHD127-0322 to 0326 US DHHS</p> <p>15 OIG Survey..... 073</p> <p>16 Exhibit Dey 201-OIG Report, August 1998</p> <p>17 HHD121-0987 to 1004..... 115</p> <p>18 Exhibit Dey 202-Ipratropium Chart..... 127</p> <p>19 Exhibit Dey 203-Dey letter of 8/10/99</p> <p>20 Marked Confidential</p> <p>21 DL-0050553..... 160</p> <p>22 Exhibit Dey 204-Grant Thornton Study..... 268</p>

2 (Pages 2 to 5)

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Clifford, Margaret

October 29, 2008

Concord, NH

Page 6	Page 8
<p>1 USA EXHIBITS</p> <p>2 NUMBER DESCRIPTION PAGE</p> <p>3 Exhibit Clifford USA 001-Figure 1: Abbott's FDB</p> <p>4 Direct Price Vs. Avg.</p> <p>5 Price for Vancomycin</p> <p>6 chart..... 245</p> <p>7 Exhibit Clifford USA 002-Figure 2: Abbott's FDB</p> <p>8 Direct Price Vs. Avg.</p> <p>9 Price for Vancomycin</p> <p>10 chart..... 245</p>	<p>1 THE WITNESS: Yes.</p> <p>2 VIDEOGRAPHER: We are now recording and</p> <p>3 on the record. My name is Patrick Battle. I am</p> <p>4 legal video specialist on behalf of Henderson</p> <p>5 Legal Service. Our business address is 1015,</p> <p>6 15th Street, NW, Suite 525, Washington, DC,</p> <p>7 20005. Today's October 29, 2008 and the time is</p> <p>8 9:25. This is the deposition of Margaret</p> <p>9 Clifford in the matter of Pharmaceutical Industry</p> <p>10 Average Wholesale Price Litigation versus United</p> <p>11 States of America ex rel., Ven-a-Care of the</p> <p>12 Florida Keys, Inc., et al., v. Dey, Inc., et al.,</p> <p>13 Civil Action Number 05-11084-PBS; and in the</p> <p>14 United States of America ex rel., Ven-a-Care of</p> <p>15 the Florida Keys, Inc., et al. v. Boehringer</p> <p>16 Ingelheim Corp., et al., Civil Action Number 07-</p> <p>17 10248-PBS; and United States of America, ex rel.,</p> <p>18 Ven-a-Care of the Florida Keys, Inc., et al., v.</p> <p>19 Abbott Laboratories, Inc., Civil Action Number</p> <p>20 06-CV-11337 and 07-CV-11618.</p> <p>21 This deposition is being held, taken at</p> <p>22 129 Pleasant Street, Concord, New Hampshire,</p>
Page 7	Page 9
<p>1 PROCEEDINGS</p> <p>2</p> <p>3 MS. WEISSBARD: What are we doing about</p> <p>4 swearing in?</p> <p>5 MR. KATZ: Do it the same as yesterday.</p> <p>6 MR. HENDERSON: Same stipulations. Is</p> <p>7 Eric Berlin on the line?</p> <p>8 MR. BERLIN: I am.</p> <p>9 MR. HENDERSON: I understand the</p> <p>10 parties attending this deposition will stipulate</p> <p>11 that although the stenographer is not authorized</p> <p>12 to administer the oath in New Hampshire,</p> <p>13 nonetheless we will accept her administration of</p> <p>14 the oath in this case as if it were properly</p> <p>15 authorized.</p> <p>16 MR. KATZ: Dey agrees with that.</p> <p>17 MR. BERLIN: I agree with that. And it</p> <p>18 seems to me that we ought to get the witness's</p> <p>19 agreement to that as well.</p> <p>20 MS. WEISSBARD: Well, I'll agree for</p> <p>21 the witness. I mean, you agree to tell the truth</p> <p>22 so, right?</p>	<p>1 03301. The court reporter is Jane Eaton of</p> <p>2 Henderson Legal Services. Counsel will state</p> <p>3 their appearances and the court reporter will</p> <p>4 administer the oath.</p> <p>5 MR. KATZ: Cliff Katz, Kelley Drye and</p> <p>6 Warren, representing the Dey defendants.</p> <p>7 MR. HENDERSON: George Henderson,</p> <p>8 Assistant U.S. Attorney representing the United</p> <p>9 States of America.</p> <p>10 MR. BERLIN: Eric Berlin on behalf of</p> <p>11 Abbott Laboratories.</p> <p>12 MS. WEISSBARD: And I'm Deborah</p> <p>13 Weissbard with the New Hampshire Attorney</p> <p>14 General's office here for Ms. Clifford.</p> <p>15 MARGARET CLIFFORD, Having been</p> <p>16 first duly sworn, was examined and testified as</p> <p>17 follows:</p> <p>18</p> <p>19 EXAMINATION</p> <p>20 BY MR. KATZ:</p> <p>21 Q. Please state and spell your name for</p> <p>22 the record?</p>

3 (Pages 6 to 9)

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Clifford, Margaret

October 29, 2008

Concord, NH

Page 50	Page 52
<p>1 low it was compared to other states.</p> <p>2 Q. Was there ever a time where a pharmacy</p> <p>3 called and complained that they might not be able</p> <p>4 to continue as a Medicaid provider due to the</p> <p>5 level of reimbursement?</p> <p>6 A. Not that I'm aware of.</p> <p>7 Q. Did you have any communications with</p> <p>8 pharmacy associations?</p> <p>9 A. Yes.</p> <p>10 Q. Which ones?</p> <p>11 A. NHPA.</p> <p>12 Q. And what does that stand for?</p> <p>13 A. New Hampshire Pharmacists Association.</p> <p>14 Q. Any others?</p> <p>15 A. NACDS. National Association Of Chain</p> <p>16 Drug Stores. Also spoke with retail merchants</p> <p>17 and NHPA, New Hampshire Independent Pharmacy</p> <p>18 Association.</p> <p>19 Q. Are you a member of any of these</p> <p>20 organizations?</p> <p>21 A. No.</p> <p>22 Q. Have you ever been a member of any</p>	<p>1 at this time.</p> <p>2 Q. Well, they might be confidential but I</p> <p>3 don't know, I don't know if they are; but we can</p> <p>4 always designate the transcript as confidential.</p> <p>5 MS. WEISSBARD: Let me step outside and</p> <p>6 ask her what her concern is. Okay?</p> <p>7 MR. KATZ: Okay.</p> <p>8 VIDEOGRAPHER: Time is 10:10. We are</p> <p>9 off the record.</p> <p>10 VIDEOGRAPHER: Time is 10:25. We are</p> <p>11 on the record.</p> <p>12 BY MR. KATZ:</p> <p>13 Q. Ms. Clifford, you just spoke with your</p> <p>14 counsel about answering questions about your</p> <p>15 communications with the New Hampshire Pharmacists</p> <p>16 Association?</p> <p>17 A. Yes.</p> <p>18 Q. And you've determined that you can</p> <p>19 answer some of my questions?</p> <p>20 A. Yes.</p> <p>21 Q. What was your concern?</p> <p>22 MS. WEISSBARD: Objection. Just ask</p>
Page 51	Page 53
<p>1 pharmacy associations of any sort?</p> <p>2 A. I think I may have been a member of</p> <p>3 NHPA at one time, but I'm not currently.</p> <p>4 Q. Does New Hampshire Medicaid receive any</p> <p>5 pharmacy publications on a regular basis?</p> <p>6 A. I don't know if they currently do. I</p> <p>7 haven't been there since 2005; but when I was</p> <p>8 there we would receive the publications.</p> <p>9 Q. Which ones?</p> <p>10 A. There was one consultant pharmacist</p> <p>11 one. I don't recall what the others were,</p> <p>12 whether it was pharmacy types or drug topics but</p> <p>13 industry magazines.</p> <p>14 Q. So you mentioned a number of pharmacy</p> <p>15 associations that you had communications with.</p> <p>16 I'd like to go through that and tell me how that</p> <p>17 came about in the substance of those</p> <p>18 communications.</p> <p>19 Let's start with the New Hampshire</p> <p>20 Pharmacists Association.</p> <p>21 A. I think my conversations with them are</p> <p>22 privileged. I don't believe I can discuss those</p>	<p>1 her the questions.</p> <p>2 BY MR. KATZ:</p> <p>3 Q. Well, tell me in a general sense, what</p> <p>4 were the subject matters of your communications</p> <p>5 with New Hampshire Pharmacists Association?</p> <p>6 A. The meetings weren't individual with</p> <p>7 the associations. All of the associations were</p> <p>8 invited to the table when -- in November of '95</p> <p>9 when House Bill 32 was published. It had a Most</p> <p>10 Favored Nation clause in there that was going to</p> <p>11 hold providers to -- the providers would not bill</p> <p>12 Medicaid any more than the lowest rate they</p> <p>13 regularly accepted from any other payer. And</p> <p>14 pharmacies were concerned that they couldn't live</p> <p>15 up to that based on at that point in time pretty</p> <p>16 much all insurance companies were on a point-of-</p> <p>17 sale system. And while their usual and customary</p> <p>18 charge they submitted to all insurance companies</p> <p>19 was the same, because the language of the law</p> <p>20 said the lowest rate they regularly accepted,</p> <p>21 pharmacies were concerned if they accepted a</p> <p>22 lower rate from another insurer, even though they</p>

14 (Pages 50 to 53)

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Clifford, Margaret

October 29, 2008

Concord, NH

Page 54	Page 56
<p>1 bill them all the same, the state might come 2 after them for accepting a lower rate from 3 another payer. 4 Q. What was the state's position with 5 respect to that concern? 6 A. We had a series of meetings with 7 representatives from each of those associations, 8 and we came to a verbal agreement that the state 9 would recognize the published rate and that House 10 Bill 32 as the lowest rate that the pharmacies 11 regularly accepted. I believe that was AWP minus 12 12 plus \$2.50 dispense fee. 13 Q. Basically the state was saying that 14 they were assuming that the AWP minus 10 was 15 equivalent to the lowest rate accepted by the 16 pharmacies? 17 A. No, the AWP minus 12. 18 Q. Sorry, AWP minus 12? 19 A. Plus the \$2.50 dispense fee would be 20 recognized as the lowest rate that they regularly 21 accepted. 22 MR. HENDERSON: AWP minus 12 or AWP</p>	<p>1 was concerning to the pharmacies was the Most 2 Favored Nation clause where they had to certify 3 that they would not bill Medicaid any more than 4 the lowest rate they regularly accepted. And 5 because of that Most Favored Nation clause, the 6 pharmacies were concerned they wouldn't be able 7 to live up to that because reimbursement from 8 different insurers changes on a daily basis; and 9 they wouldn't know on any given day when they are 10 submitting a claim what the lowest rate they 11 might accept later in that day was from another 12 insurer. 13 Q. Was a decision to change the 14 reimbursement to AWP minus 12 percent plus \$2.50 15 arrived at in whole or in part based on 16 negotiations with the pharmacy association? 17 MR. HENDERSON: Objection. 18 MS. WEISSBARD: She just answered that 19 question. Objection. Don't answer it. You 20 already answered it. 21 BY MR. KATZ: 22 Q. Well, let me just make sure the record</p>
Page 55	Page 57
<p>1 minus 16? 2 THE WITNESS: In 1995. 3 MR. KATZ: Objection. I mean, he'll 4 get his chance. 5 BY MR. KATZ: 6 Q. We are talking about 1994 right now? 7 A. This is 1995, November of 1995 when 8 House Bill 32 was published is when we were first 9 contacted. 10 MR. HENDERSON: Okay. Apologize for 11 the interruption. 12 BY MR. KATZ: 13 Q. In November of 1995, I believe it was 14 AWP minus 10 and then in -- and then shortly 15 after that it went to AWP minus 12? 16 A. On November, I think, I believe it was 17 3, 1995, House Bill 32 was published which said 18 that the reimbursement rate was going to change 19 in January from AWP minus 10 plus our variable 20 dispense fee to AWP minus 12 plus a \$2.50 21 dispense fee. The variable dispense fee was 22 going away. But also in that House Bill and what</p>	<p>1 is clear. 2 MS. WEISSBARD: She just said she had a 3 meeting. They had negotiations, they sat, they 4 talked with associations, the representatives 5 came to the table. That's it. Move on. 6 MR. HENDERSON: I'm not clear on what 7 the question is. I guess I would prefer some 8 clarification. 9 MS. WEISSBARD: All right. 10 MR. HENDERSON: Just so the record is 11 clear. 12 BY MR. KATZ: 13 Q. Just so the record is clear, the rate 14 was AWP minus 10 percent? 15 A. Uh-hum. 16 Q. The New Hampshire Medicaid proposed the 17 Most Favored Nation clause, New Hampshire 18 Medicaid? 19 MS. WEISSBARD: Is that accurate? 20 THE WITNESS: No. New Hampshire 21 Medicaid didn't propose it. That was a 22 legislative proposal, House Bill 32.</p>

15 (Pages 54 to 57)

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Clifford, Margaret

October 29, 2008

Concord, NH

Page 154	Page 156
<p>1 could be, I mean, I'm not sure. But my 2 understanding, noninnovator would be generic 3 company and you sometimes have generic that's not 4 a multiple source because the brand name or the 5 innovator drug has been removed for the market 6 and is only generic left.</p> <p>7 Q. Wasn't quite clear on what a 8 noninnovator, what you're saying a noninnovator 9 multiple source drug is. Would that be generic 10 drug?</p> <p>11 A. Yes.</p> <p>12 Q. And an innovator multiple source drug 13 would also be a generic drug?</p> <p>14 A. No. The innovator is the company, the 15 branded product, the first to market.</p> <p>16 Q. So it is your understanding that 17 innovator multiple source drug would be a drug 18 under patent?</p> <p>19 A. No.</p> <p>20 Q. What would it be?</p> <p>21 A. It is the brand name that's still 22 available when generics come to the market.</p>	<p>1 A. That's what the report says, yes.</p> <p>2 Q. So for multiple source drug with an 3 FUL, on average if the AWP was 100, that would 4 mean on average the actual acquisition cost would 5 be 27.9, right?</p> <p>6 A. Yes.</p> <p>7 Q. So that would mean that the AWP is more 8 than three times than the -- more than the actual 9 acquisition cost, right?</p> <p>10 A. Roughly, yes.</p> <p>11 Q. In the next paragraph it says, "Based 12 on the results of our additional analyses, if 13 states continue to use a reimbursement system 14 based on AWP, we recommend that CMS encourage 15 states to consider using a four-tiered 16 reimbursement methodology."</p> <p>17 Do you know whether or not CMS 18 encouraged New Hampshire to use a four-tiered 19 reimbursement methodology?</p> <p>20 A. I do not know. But we weren't 21 necessarily paying on AWP. If something had an 22 FUL, we were paying at the FUL. If there was</p>
Page 155	Page 157
<p>1 Q. Okay. I understand. You see that for 2 generic drugs there's a greater difference. The 3 noninnovator multiple source drugs has greater 4 difference between AWP and actual acquisition 5 cost than the innovator multiple source drugs. 6 Do you see that?</p> <p>7 A. Are we talking in this third bullet?</p> <p>8 Q. Yes.</p> <p>9 A. Yes.</p> <p>10 Q. Last bullet point says "pharmacies 11 purchase drugs at estimated discount of 72.1 12 percent below AWP." So that would mean that if 13 the --</p> <p>14 A. Only for multiple source drugs with 15 FULs.</p> <p>16 Q. Right.</p> <p>17 A. Okay, well, you didn't say that.</p> <p>18 Q. Okay. I'll rephrase and I'll ask it 19 again. For multiple source drugs with FULs, 20 pharmacies purchase the drugs at estimated 21 discount of 72.1 percent below AWP. That's what 22 the OIG report says, right?</p>	<p>1 something we had a state MAC at, we were paying 2 at the state MAC. I mean, if you want to call 3 that a tiered formulary or lesser of formulation, 4 that was in a sense a tiered formulary.</p> <p>5 Q. This report shows that drugs, multiple 6 source drugs without FULs -- withdraw that.</p> <p>7 This report states that noninnovator 8 multiple source drugs without FULs had a 54.2 9 percent difference between AWP and actual 10 acquisition cost, while the difference between 11 AWP and actual acquisition cost for single source 12 innovator drugs was 17.2 percent.</p> <p>13 Did New Hampshire Medicaid consider 14 using a different methodology for these two types 15 of drugs?</p> <p>16 A. Well, for the multiple source drugs 17 that didn't have an FUL, but there were multiple 18 source, we may have had a state MAC. I mean, you 19 would have to have a specific example to look to 20 know whether or not we did or not.</p> <p>21 Q. That wasn't my question. My question 22 was whether or not, to your knowledge, has New</p>

40 (Pages 154 to 157)

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Clifford, Margaret

October 29, 2008

Concord, NH

<p style="text-align: right;">Page 174</p> <p>1 Q. So New Hampshire then struck a deal 2 with these providers that even if they got paid 3 less, that you would treat the lowest payment as 4 AWP minus 12 percent and \$2.50? 5 A. We had the verbal agreement that we 6 would recognize that as the lowest rate that they 7 regularly accepted. 8 Q. And what was the reason for entering 9 that agreement with the providers at that time? 10 A. Because they were arguing that Most 11 Favored Nation, the way it was written as the 12 lowest rate that they regularly accepted, was 13 unenforceable; and that also was a concern that 14 there might be a plan out there that at the time, 15 you know, paid less but was not a popular plan. 16 So on average their reimbursement that they were 17 accepting would have been around AWP minus 12 18 plus the \$2.50, but they might have one odd ball 19 here or there that might dip lower than that. 20 And they were concerned that that would expose 21 them to, you know, the state coming back on them 22 after an audit.</p>	<p style="text-align: right;">Page 176</p> <p>1 to bill us their lowest rate that they regularly 2 accepted. And their argument was that that was 3 impossible. And the way that the point-of-sale 4 billing system is designed, pharmacies submit 5 their usual and customary charge on a claim. And 6 that's the same no matter who the third-party 7 payer is. 8 BY MR. BERLIN: 9 Q. Okay. And you're doing great. It is 10 totally me. I'm not making this question clear 11 enough so I just want to try again. 12 When the Most Favored Nations clause 13 was going to go into effect, was it contemplated 14 by New Hampshire Medicaid that the providers 15 would be reporting one number, which was the 16 number in aggregate for what they were being paid 17 or reimbursed for dispensing that NDC, or did you 18 want them to break it down into the ingredient 19 costs and separately the dispensing fee? 20 MR. HENDERSON: Objection. 21 THE WITNESS: The Most Favored Nation 22 was put in as a legislative change, and I don't</p>
<p style="text-align: right;">Page 175</p> <p>1 Q. When they were supposed to report the 2 lowest rate as part of the Most Favored Nations 3 provision, it was just one number; is that 4 correct? 5 A. It was difficult because of the way the 6 billing system worked we asked for their usual 7 and customary charge. And the way it was defined 8 in the Most Favored Nation said they wouldn't 9 bill us any more than the lowest rate they 10 regularly accepted which contradicts them billing 11 their usual and customary charge. 12 Q. Let me see if I can ask a better 13 question because mine was a little unclear. What 14 I'm asking is you weren't asking them to report 15 separately the payment they received for 16 ingredient costs and payment they received for 17 dispensing fee; you were asking them in total, in 18 the aggregate, what is the lowest that you're 19 receiving for this particular drug; is that 20 correct? 21 MR. HENDERSON: Objection. 22 THE WITNESS: No. We were asking them</p>	<p style="text-align: right;">Page 177</p> <p>1 believe anybody from the department had any input 2 on that. To my knowledge, nobody -- I did not 3 have any input on that. It was a legislative 4 mandate so I would have to say no on that. 5 BY MR. BERLIN: 6 Q. No as -- I'm unclear as to what you're 7 answering no. Could you clarify that? 8 A. Well, you asked me did the department, 9 was the department asking the pharmacies to 10 submit -- I don't know. Can you repeat your 11 question? 12 Q. Let me -- I'm sorry we're spending so 13 much time on this but I think I can clarify it 14 for you. 15 My real question is: When you were 16 expecting the pharmacies to provide a number to 17 you as in their most favored payment, did you 18 expect that they would be giving you one number; 19 or did you expect that they would break down 20 estimated acquisition costs -- or excuse me -- 21 the ingredient cost and separately the dispensing 22 fee that they were being paid?</p>

45 (Pages 174 to 177)

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